

**OCT 18 2005**

**CATHY A. CATTERSON, CLERK**  
**U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL A. RILEY,

Defendant - Appellant.

No. 03-30526

D.C. No. CR-01-00259-RSL

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Western District of Washington  
Robert S. Lasnik, District Judge, Presiding

Submitted October 11, 2005<sup>\*\*</sup>

Before: T.G. NELSON, WARDLAW, and TALLMAN, Circuit Judges.

Michael A. Riley appeals the restitution order imposed following a guilty-plea conviction for conspiracy to produce fictitious obligations, possession of fictitious obligations, and identification fraud, in violation of 18 U.S.C. §§ 371,

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

514(a)(2), and 1028(a)(5) and (b)(1)(A)(ii). We have jurisdiction pursuant to 28 U.S.C. § 1291. We review issues raised for the first time on appeal for plain error, *see United States v. Olano*, 507 U.S. 725, 732-34 (1993), and we affirm.

Appellant contends that the district court plainly erred when it failed to consider appellant's ability to pay restitution, and instead relied on the Inmate Financial Responsibility Program when setting his payment schedule.

We disagree. A review of the record demonstrates that the district judge properly recognized its non-delegable duty to create the payment plan, and created appellant's schedule. *See United States v. Gunning*, 339 F.3d 948, 949 (9th Cir. 2003) (per curiam) (noting that the responsibility for setting a restitution payment schedule is non-delegable). Further, the district court had access to appellant's financial information so that it was able to consider the factors set forth in 18 U.S.C. § 3664. *See United States v. Mills*, 991 F.2d 609, 611 (9th Cir. 1993) (requiring "that the record reflect that the district judge had at his disposal information bearing on the considerations enumerated in section 3664 . . . [and] some indication that the judge gave thought to the relevant information") (internal citations omitted).

Appellant submitted a motion to allow supplemental briefing on the impact of *Blakely v. Washington*, 542 U.S. 296 (2004). However, because we are able to

reliably determine from the record that appellant's sentence would not have been materially different had the district court known that the sentencing guidelines were merely advisory, we deny this motion. *See United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc) (“ . . . where it is not possible to reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory, we will remand to the sentencing court to answer that question”).

**AFFIRMED.**